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Supreme Court of the United States

OCTOBER TERM, 1964

No. 96

RESERVE LIFE INSURANCE COMPANY, *Appellant,*

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO, *Appellee.*

On Appeal from the Supreme Court of Ohio and from the Court of Appeals, First Appellate District, State of Ohio

REPLY BRIEF OF THE APPELLANT

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REPLY BRIEF OF THE APPELLANT

LIMITED SCOPE

This brief is limited to two rather surprising arguments of the Appellee which could hardly have been anticipated.

The first is more of a new twist on the "in lieu of all other taxes" language of section 5725.25 of the Revised Code of Ohio (Appellant's Brief, App. 12a).

Appellee now says in effect that the admitted discrimination involved in Ohio's *ad valorem* tax on the furniture and fixtures of a foreign insurance company, but not of a domestic insurance company, is beyond the protection of the Fourteenth Amendment because the same amount of tax discrimination or possibly more might have been accomplished, without violating this amendment, simply by means of an even more discriminatory franchise tax on such foreign insurance company.

The second argument is an eleventh-hour attempt to raise for the first time in this case, the very old question of whether a corporation has any right under the equal protection of the laws clause of the Fourteenth Amendment, a proposition long since well settled against Appellee's position.

Neither argument would seem to merit very lengthy discussion.

I. OHIO'S PERSONAL PROPERTY TAX AGAINST APPELLANT FOREIGN INSURANCE COMPANY MUST BE TESTED AS IT IS NOW WRITTEN, AND NOT AS IT MIGHT BE REWRITTEN INTO A MORE DISCRIMINATORY FRANCHISE TAX

The Appellee's net argument in support of the taxing measure here involved, reduced to its simplest terms, is as follows: Since it is conceded that a state may discriminate against foreign corporations in exchange for extending the privilege to them of doing business within the state, then such discrimination against foreign corporations and in favor of domestic corporations may properly pervade all or any part of the entire taxing structure of the state. In other words, Appellee says that the same amount of tax money *might* have been extracted from Appellant in the form of a *more*

discriminatory *franchise* tax (if the legislature had seen fit to do so), and that, therefore, Appellant foreign insurance company has no right to complain of the *ad valorem* personal property tax imposed upon it but not upon domestic insurance companies. If this line of thinking should be followed to its logical conclusion, a state could discriminate against a foreign company in any form of tax, fee or charge which it collects, for example, gasoline taxes, sales taxes or taxes on real property. This is indeed a novel theory, not only without judicial precedent, but directly contrary thereto. *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562 (1949). As noted in that case, and as discussed at length in our original brief, the courts have always recognized the dividing line between franchise or privilege taxes on the one hand and *ad valorem* taxes on the other hand. The personal property tax here involved clearly falls within the latter class, where arbitrary classification and resulting discrimination are prohibited.

To speculate, as the Appellee does, as to what the state of Ohio "might" have done in establishing its tax structure is entirely irrelevant. This Court must pass upon the constitutionality of these taxing statutes as they are, both franchise and *ad valorem,* and not as they might have been drawn.

The extended discussion in our original brief of the franchise and real property tax statutes of Ohio was not advanced as a test of the validity of either, but rather to show clearly that in neither is there any room for a "hidden" or "equalizing" tax upon domestic insurance companies in Ohio which would justify their exclusion from the personal property taxing measure. By thus demonstrating that domestic

insurance companies clearly do not pay any taxes to which foreign insurance companies are not subject to the same or greater extent, the Appellee's "in lieu of" argument becomes nothing but words. With this showing of the complete picture of Ohio's tax laws, the Appellant avoids the pitfall to which the taxpayer in *Concordia Fire Insurance Co.* v. *Illinois,* 292 U.S. 535 (1934) fell prey. There, this Court stated (292 U.S. at 548):

> "For aught that appears it may be that taxes not applied to the foreign corporations are laid on the domestic corporations which are the substantial equivalent of the net receipts tax."

No such assertion can be made here.

The Appellee fails to direct this Court's attention to any cases which would support its position, preferring instead to extract a series of terse quotes from inapposite decisions. For example, the cases of *Cheney Bros. Co.* v. *Massachusetts,*[1] 246 U.S. 147 (1918), and *Baltic Mining Co.* v. *Massachusetts,* 231 U.S. 68 (1913), were purely franchise tax decisions. The case of *Cincinnati Air Taxi, Inc.* v. *Bowers,* 180 N.E. 2d 17 (1962), concerned a personal property tax on unlicensed aircraft owned by Ohio residents, and did not involve resident versus nonresident discrimination. The *Carmichael* v. *Southern Coal and Coke Co.* case, 301 U.S.

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[1] The *Cheney Bros.* case actually involved seven foreign corporations, six of which challenged the imposition of the excise tax under the commerce clause, alleging that they were not engaged in local business within Massachusetts. Only one of the plaintiffs there, White Company, which had conceded that it was engaged in a local business in Massachusetts, raised the equal protection argument.

495 (1937), tested the constitutionality of the Alabama Unemployment Compensation Act, which did not discriminate between domestic and foreign corporations. *Metropolitan Casualty Ins. Co.* v. *Brownell,* 249 U.S. 580 (1935), involved an Indiana statute regulating the clauses which foreign insurance companies could insert in their policies. No tax measure was there involved. The Appellee does not even attempt to distinguish the *Wheeling Steel* and *Hanover Fire* cases, probably for the obvious reason that they are directly in point on the necessary demarcation between franchise and *ad valorem* taxes.

This Court, in *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959), upheld an Ohio statute which imposed a tax on the merchandise of Ohio residents held in storage warehouses, while excluding from the tax similar merchandise of nonresidents. A majority of the Court found the statutory classification not arbitrary and, accordingly, not violative of the equal protection clause. Mr. Justice Brennan wrote a separate opinion, concurred in by Mr. Justice Harlan, expressing the view that a classification which discriminates *against* a state's residents and in favor of nonresidents "clearly presents no state action disruptive of the federal pattern" (358 U.S. at 533). In both opinions, this Court recognized the continuing validity of the *Wheeling Steel* holding that arbitrary classification and its resulting discrimination against a foreign corporation in the *ad valorem* tax field is violative of the equal protection clause. It is submitted that the instant case presents the clearest example of just such a prohibited classification.

II. THAT A CORPORATION IS ENTITLED TO THE BENEFITS OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT OPEN TO QUESTION AT THIS LATE DATE

The Appellee has raised an additional point not heretofore urged in any of the lower court proceedings, or in prior opposition to the noting of jurisdiction by this Court. Appellee points out that under Ohio law a domestic insurance company must be either a corporation or an association of not less than thirteen persons. (Ohio Rev. Code §§ 3907.01-02). Appellant is, of course, a corporation. Whether Appellant could conduct an insurance business in Ohio as a different type of entity is beside the point and adds nothing to Appellee's position.[2] Stripped of surplusage, appellee's argument is, that being a corporation, Appellant does not come within the scope of the equal protection clause of the Fourteenth Amendment to the Constitution. While this argument is new to the instant case, it is very old in the field of constitutional law. Between 1886 and 1889, this Court decided four cases which established the principle that corporations are persons within the meaning of the Fourteenth Amendment and may envoke the benefits of the equal protection clause. *Santa Clara County* v. *Southern Pacific R.R. Co.*, 118 U.S. 394 (1886); *Pembina Con. Silver Mining Co.* v. *Pennsylvania*, 125 U.S. 181 (1888); *Missouri Pacific R. Co.* v. *Mackey*, 127 U.S. 205 (1888); *Minneapolis R. Co.* v. *Beckwith*, 129 U.S. 26 (1889).

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[2] In the interests of completeness, perhaps it should also be noted that under certain circumstances foreign unincorporated companies, partnerships and associations, as well as corporations, may qualify to engage in the insurance business in Ohio if they meet the other requirements (Ohio Rev. Code, §§ 3909.09-17).

In the footnote below,[3] we have cited a few of the leading decisions of this Court subsequent to 1889 which have specifically recognized and reiterated this doctrine. In at least 267 other cases, by actual count, this Court reached the *merits* of a contention by *a corporation* that a particular state statute denied it the equal protection of the law guaranteed by the Fourteenth Amendment. As recently as June 22, 1964, in *Bell* v. *Maryland*, 378 U.S. 226, 262, Mr. Justice Douglas in Appendix I to his opinion, recognized that corporations are entitled to the equal protection of the laws and stated: "While that view is the law today, it prevailed only over dissenting opinions."

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[3] *Home Insurance Co. of New York* v. *New York*, 134 U.S. 594 (1890);
Charlotte, C. & A.R. Co. v. *Gibbes*, 142 U.S. 386 (1892);
Covington & L. Turnpike Road Co. v. *Sandford*, 164 U.S. 578 (1896);
Gulf, C. & S.F.R. Co. v. *Ellis*, 165 U.S. 150 (1897);
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Blake v. *McClung*, 172 U.S. 239 (1898);
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Concordia Fire Insurance Co. v. *Illinois*, 292 U.S. 535 (1934);
Wheeling Steel Corporation v. *Glander*, 337 U.S. 562 (1949).

We cannot believe that this Court would want any further reargument of this established principle.

Respectfully submitted,

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